

DEC 19 2012

TONY R. MOORE, CLERK
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

Sons

Civil Action No. 6:12-2579

versus

Judge Richard T. Haik, Sr.

Medtronic Inc.

Magistrate Judge C. Michael Hill

ORDER

Before the Court is a Motion To Remand filed by plaintiff [Rec. Doc. 15] and Medtronic's, opposition thereto [Rec. Doc. 17].

This matter arises out of the September 11, 2002 surgery performed on plaintiff, Kenneth Sons, during which his treating physician, Dr. Patrick J. Welch, implanted a pacemaker in his chest. Plaintiff alleges that he has suffered with medical issues as a result of Dr. Welch failing to appropriately wire the pacemaker and defendant, Medtronic, Inc., failing to "adequately monitor the "emplacement, benefits, and function of the implanted pacemaker." *R. 1; Exh. A.*

The record reveals that plaintiff filed a Petition For Damages on August 17, 2012 in the Fifteenth Judicial District Court, Lafayette Parish, Louisiana, naming Medtronic as the only defendant. *Id at ¶1.* Plaintiff represents that prior to filing his Petition he filed a complaint with the Patient Compensation Fund (the "Fund") alleging the malpractice of Dr. Welch as well as Medtronic, in accordance with La. R.S. 40:1299.41, *et seq.* Because Medtronic was found not to be a qualified healthcare provider under the Fund, plaintiff contends he is not entitled to the interruption of prescription provided for by the Act, and he was therefore required to

file this action in order to preserve his cause of action. *R. 15, Exh. C.* Medtronic removed plaintiff's case to this Court on September 26, 2012. *R. 1.*

In his motion to remand, plaintiff states that he could not name Dr. Welch as a defendant in this because his complaint against him is still pending in the Fund. *R. 15.* Plaintiff further states that he will add Dr. Welch to this action once the Medical Review Panel has made their decision at which time diversity jurisdiction will be destroyed. *Id.* Plaintiff is correct that he did not have a right to pursue Dr. Welch, a qualified health care provider under the Louisiana Medical Malpractice Act ("LMMA"), because any claim against him before the medical review panel is complete would be premature.

The LMMA applies to all claims "arising from medical malpractice" and states that "[n]o action against a health care provider covered by this Part, or his insurer, may be commenced in any court before the claimant's proposed complaint has been presented to a medical review panel established pursuant to this Section." La. R.S. 40:1299.47(B)(1)(a)(I). Louisiana district courts have consistently held that claims against qualified health care providers prior to the medical review panel's completion of review are improperly joined and must be dismissed as premature. *See e.g., Silvestrini v. Intuitive Surgical, Inc.*, 201 WL 380283 (E.D. La. Feb. 6, 2012); *Fontenot v. Johnson & Johnson*, 2010 WL 2541187, 9 (W.D.La.,2010); *Bourne v. Eli Lilly & Co.*, 2005 WL 2998914, 3 (W.D.La.,2005).


In *Bourne*, the court applied the LMMA and held that because a claim filed against a physician defendant prior to the completion of the medical review panel procedure was premature and subject to dismissal, the physician defendant's

“presence must be disregarded for the purposes of determining diversity jurisdiction.” *Id. at**3. The court recognized that, at the time of removal, “plaintiffs do not have a right to pursue a claim in any court against [the defendant physician] ... [and] the propriety of removal is to be judged as of the time of the removal, not as of some future time. *Id. at* *2. “[T]he possibility that a later joinder might defeat diversity and necessitate remand is not grounds to remand at present.” *Id.*

Accordingly,

IT IS ORDERED that the Motion To Remand filed by plaintiff, Kenneth Sons, [Rec. Doc. 15], is **DENIED**.

Thus done and signed this 18th day of December, 2012 at Lafayette, Louisiana.



RICHARD T. HAIK, SR.
UNITED STATES DISTRICT JUDGE